81-2241

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JANE KEMBER and
MORRISON BUDLONG,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court err by effectively invalidating Article XII, Anglo-American Extradition Treaty of 1977, through an interpretation contrary to both the explicit language of the Treaty, and the express view of the Lord Chief Justice of England relating to the facts of this case?

(a) Was the admission of evidence in the District Court, which the British specifically rejected as a basis for extradition, a violation of Article XII of the Treaty?

(b) Did the prosecutor mislead the British court when he assured it the defendants would be tried "solely" on second degree District of Columbia burglary charges and thereafter,

during the trial offered evidence of a massive conspiracy to steal important Government documents which he assured the British Court he would not do?

2. Did the Court violate Article XII of the Treaty by punishing defendants for non-extradited offenses?

3. Did the Court invalidate the Treaty by permitting the trial court to consider facts barred from consideration by the Treaty in determining whether to divest itself of jurisdiction?

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United States Court of Appeals
for the District of Columbia Cir.
Filed March 5, 1982

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United States Court of Appeals
for the District of Columbia Cir.
Filed April 15, 1982
[Rehearing denied.]

ORDER
United States Court of Appeals
for the District of Columbia Cir.
Filed April 15, 1982
[Suggestion for Rehearing en banc
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PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD H. KIRSCHNER, on behalf of JANE KEMBER and MORRISON BUDLONG, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at __ U.S.App. D.C.__, __ F.2d __ (March 5, 1982).

JURISDICTION

The Judgment of the Court of Appeals affirming the conviction was entered on March 5, 1982. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 15, 1982; the mandate was stayed until June 4, 1982.

STATEMENT OF THE CASE

In August 1978, the defendants and nine other employees of the Church of Scientology were indicted in the United States District Court for the District of Columbia. The indictment, in 28 counts, charged

the defendants with conspiracy to burglarize Government offices and steal Government documents, 18 USC 371, interception of oral communications, 18 USC 2511(1)(a), theft of Government documents, 18 USC 641, obstruction of justice, 18 USC 1503, and second degree burglary, 22 D.C. Code 1801(b).

Kember and Budlong were residing in England, and the United States commenced extradition proceedings requesting the United Kingdom to extradite them on all the charges. After lengthy extradition hearings before the Bow Street Stipendiary Magistrate, Kember and Budlong were ordered extradited on only the purely local District of Columbia charges of second degree burglary. The Magistrate's

Extradition Order states the defendants were extradited for the crimes of "burglary as set out in Schedule A annexed." Schedule A alleges, in 10 counts, that defendants "entered an office[s] in the District of Columbia with intent to steal property, i.e., photocopy paper, which was the property of the United States of America." During the extradition proceedings before the Divisional Court of the Queen's Bench Division of the High Court of Justice, defendants urged that it was likely that when extradited they would be put on trial and/or punished for something other than aiding and abetting a burglary of photocopy paper. In addressing this contention, Mr. Justice Griffiths, in an opinion joined by the Lord Chief Justice of England,

stated,

> "If [the defendants] were ostensibly tried for burglary, but in fact punished for the commission of a different offense, I should regard that as flagrant bad faith."
> Regina v. Governor of Pentonville Prison ex parte Budlong [1980], All.Er. 701, 714.

During the United Kingdom extradition proceedings, the prosecutor who was to handle the case at trial assured the English court these defendants would be tried "solely on the burglary counts of the indictment." The representation was made to assuage the English court and assure the defendants would not be tried for the non-extradited offenses of conspiracy to burgle, stealing Government documents, obstruct justice, intercept wire communications, and the other substantive non-extradited offenses charged in the original indictment.

During the extradition proceedings, the British government was presented, inter alia, with facts relating to a conspiracy involving earlier burglaries [1] and a 1974 "bugging" incident. The British rejected and refused extradition on these facts, finding the only extraditable charges to be the purely local District of Columbia second degree burglary charges. Once the defendants were extradited to the United States to stand trial, the Government's true intention to try the defendants on all of the charges in the indictment became apparent:

> "These ten burglaries have been charged as part of a massive conspiracy against the United States. The

---

[1] Burglaries earlier than those charged in the ten counts upon which extradition was granted.

> "defendants will be tried only on ten District of Columbia charges, evidence of the remaining fourteen United States co-defenses with which they are charged will be admissible at their trial. Similarly, in view of the evidence and the case law, defendants will be tried on a conspiracy theory." (Government's Opposition to Defendant's Motion for an Order Divesting the Court of Jurisdiction.)

This statement was a harbinger of the evidence at trial.

The trial court issued an order which correctly reflected the relationship between the Anglo-American Extradition Treaty and the facts upon which the defendants could be proceeded against:

> "1. The defendants were extradited pursuant to the Anglo-American Extradition Treaty for burglary upon a finding that there was sufficient evidence of their participation as aiders and abettors, and that aiders and abettors are liable as principals.
>
> "2. <u>There was a deliberate exclusion from the extradition order of a conspiracy charge</u>.

***

"4. Aiding and abetting is a concept distinct from that of conspiracy. The essence of aiding and abetting is participation, while the essence of conspiracy is agreement.

"5. To allow the Government to proceed under a conspiracy theory would contravene the extradition order which specifically precluded conspiracy proceedings against the defendants and would thus violate the Anglo-American Extradition Treaty."
(Order, Oct. 21, 1980.)

However, facts relating to the conspiracy involving earlier burglaries and the 1974 interception of wire communications incident were introduced during the course of the trial. [2/] It is defendant's contention that evidence of these facts were "facts in respect of which" extradition was specifically rejected by the British and, therefore, may not be used as a basis to "proceed

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[2] Testimony of Michael Meisner and Exhibits 5, 8-12, 17, 19-25, 37-50, 40-47.

against the defendants."

Article XII, Anglo-American Extradition Treaty of 1977, provides, in pertinent part:

> "A person shall not be detained or proceeded against in the territory of the requesting party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted . . ."

Extradition was granted only for the purely local burglary charges. Extradition was not granted with respect to any of the other charges contained in the indictment. Consequently, introduction of facts relating to the conspiracy involving earlier burglaries and the 1974 bugging incident were "facts in respect of which" extradition was specifically rejected, and therefore could not be used as a basis to "proceed against the defendants."

Prior to the surrender of the defendants to the custody of the United States, their nine co-defendants were convicted of various offenses charged in the indictment. They appealed, and the convictions were affirmed, United States v. Heldt, __U.S.App.D.C.__, __ F.2d__ (1981).

During the trial of defendants, several of the convicted co-defendants, who had been subpenaed to testify for the Government under grants of use immunity, refused to testify and were held in civil contempt by the District Court. They appealed on the ground, inter alia, that because defendants were extradited and arraigned only on "local" charges, the Court lacked jurisdiction to try them and the Court therefore had no jurisdiction to compel the co-defendants' testimony. The

Appellate Court, in United States v. Kember, 648 F.2d 1354 (D.C.Cir. 1980), held that the District Court had the power to proceed and therefore the contempt citations were valid, but as to defendants Kember and Budlong there was a second question:

> ". . .The subsequent question if the power to proceed exists [is] would exercise of that power in the setting presented, constitute an abuse of discretion.
>
> ***
>
> "The U.S. District Court for the District of Columbia should decline to try local offenses when those offenses have been disassociated from any federal charges prior to trial and retention of the case would not comport with the 'responsibilities of the District Court with respect to matters of federal concern."

The Court further commented:

> "Our decision today, therefore, does not preclude defendants Kember and Budlong if they are convicted, from claiming that the District Court abused its discretion by trying them on wholly local offenses for which they were extradited. We express no opinion on that issue, noting only that the

> "peculiar problems of extradition make this an atypical case." Id., at 1360, n. (Emphasis added.)

Hence the jurisdiction issue was narrowly defined:

> "Did the Federal District Court abuse its discretion when it proceeded to try appellants Kember and Budlong solely on the local charges, their prosecution on the federal charges and the legitimate federal concern having been barred as a result of the operation of the extradition proceedings?"

Thereafter, the defendants were tried and found guilty on nine counts of burglary.

During the sentencing process the District Court, in violation of the Treaty, considered all of the charges in the indictment and meted out sentences almost identical to the nine co-defendants earlier tried and sentenced. 3/

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[3] The defendants were sentenced to concurrent terms of imprisonment of two to six years.

REASONS FOR GRANTING THE WRIT

The Appellate Court's decision means an extraditee from the United Kingdom may be proceeded against in the United States on the basis of facts rejected by the British. The opinion thus invalidates Article XII of the Treaty, which states, in pertinent part:

> "A person shall not be detained or proceeded against. . .[except] for any offense established by the facts in respect of which his extradition has been granted."

This language makes it clear that extraditees may not be tried or punished for facts upon which extradition was rejected.

The Appellate Court's opinion also concludes that an extraditee may be punished for non-extradited offenses.

Finally, the Appellate Court's holding that the District Court did not abuse its discretion by failing to divest

itself of jurisdiction ignores the impact of the Extradition Treaty on what may be considered a "legitimate federal concern."

A. ARTICLE XII OF THE ANGLO-AMERICAN EXTRADITION TREATY OF 1977 WAS INVALIDATED WHEN EVIDENCE OF "FACTS IN RESPECT OF WHICH" EXTRADITION WAS SPECIFICALLY DENIED WERE INTRODUCED INTO EVIDENCE.

The Anglo-American Extradition Treaty of 1977, Article XII(1),28 U.S.T. 227,T.I.A.S.No.8468, is part of the law of the United States and,

> "shall be observed and fulfilled with good faith. . .by the United States of America and by the citizens of the United States of America and all of the persons subject to the jurisdiction thereof." (Proclamation by President Ford, Nov.17, 1976; see, Foster v. Neilson, 27 U.S. 253 (1829).

The 1977 Treaty provides that a person may not be "detained or proceeded against" for any "offense other than an extraditable offense established by the

facts in respect of which his extradition has been granted. . ." The plain meaning of the words is that a defendant may only be tried upon the facts which the English magistrate found sufficient to warrant extradition. A fortiori, facts upon which extradition was denied may not be used to "proceed against" them. In interpreting Article XII of the current Treaty, it is important that the language used represents a significant change from the language of the previous Anglo-American Extradition Treaty of 1935, 12 U.S.T.482 (1936). In the earlier Treaty, the equivalent provision to Article XII of the current Treaty provides, in pertinent part:

> "A person surrendered can in no case be kept in custody or brought to trial in the territories of the High Contracting Party to whom the surrender is made for any other crime or offenses, or on account of any other matters, than those

"for which extradition shall have taken place. . ."

It should be noted that Article XII of the current Treaty also differs from the comparable provisions in the almost contemporaneous Canadian-American Extradition Treaty which states only:

> "A person shall not be detained, tried or punished in the territory of the requesting state for an offense other than that for which extradition has been granted." (Article XII, 20 U.S.T.983 (1976)

Thus, the language in the current Anglo-American Extradition Treaty sets a more stringent requirement concerning what the requesting party may do with regard to the proceedings against the extraditee, once extradition has been granted. Such a change cannot be meaningless. Had the United States and the United Kingdom wished to provide only the same protection as the 1935 Treaty, they could have, and surely would have

done so. It follows, therefore, that when interpreting Article XII of the current Treaty the Court must find that the law of the United States extends some greater measure of protection than it did under the 1935 Treaty.

The British government refused to extradite defendants for a conspiracy involving earlier burglaries and the interception of wire communications involving a 1974 "bugging" incident. Nevertheless, facts relating to the earlier burglaries and "bugging" incident were introduced during the course of the trial. It is defendants' contention that evidence of these facts were "facts in respect of which" extradition was specifically refused by the British, and, therefore, may not be used as a basis to "proceed against the defendants," without invalidating the

the Treaty. The argument is not that evidence of these facts were not submitted to the British and therefore cannot be used during the course of the United States proceedings, but rather, these were facts "in respect of which" extradition was specifically denied. Neither Regina v. Aubrey-Fletcher, ex parte Ross-Munro [1968] No. 1 Q.B. 620, nor the Minutes of the Extradition Negotiations between the United States and the United Kingdom held in 1969 address this issue.

In fact, this issue is the converse of that presented in Regina v. Aubrey-Fletcher, supra. The Aubrey-Fletcher Court framed the issue in terms of whether:

> "[the person extradited] can be put in peril of conviction on any facts other than those put forward to secure his surrender." Id., at 626-629.

Our situation relates to facts which were "put forward to secure [extraditees'] surrender," but which facts were rejected by the British as a basis for extradition. Consequently, the concerns which the Aubrey-Fletcher court found so alarming are not present in the instant case. In short, prohibiting evidence of facts which were rejected by the requisitioned state does not interfere with the ordinary procedures and laws of evidence in the requisitioning state.

Contrary to the Appellate Court's assertion, Article XII does not "merely recognize and apply" the principal of specialty.

The Anglo-American Extradition Treaty limits the trial of an accused to the extradited crimes comprised of the "facts" for "which. . .extradition

"has been granted." However, at trial facts relating to the non-extradited offenses, which facts had been presented to the British magistrate and rejected, were admitted into evidence in the United States.

An accused may be tried only upon the issues of fact for which extradition was granted and none other. United States v. Rauscher, 119 U.S. 407, 421 (1886), Justice Miller speaking succinctly describes the jurisdiction of the Court when trying the extradited offender:

> ". . .It is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the Treaty, and ascertained by the proceedings under which the party is extradited without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."

Rules of Evidence may not be used to

circumvent the clear mandate of the Treaty. The Government may not do indirectly what it is prohibited from doing directly. In a manner of speaking, the Extradition Treaty prohibits the admission of evidence relating to other crimes, wrongs or acts, since a person may not be "proceeded against" for any offense other than the extradited offense established by the facts in respect of which his extradition has been granted. If the United States acts in violation of the Treaty, which it has done in the case at bar, "the courts will find themselves without jurisdiction over the defendant." United States v. Rauscher, supra; United States v. Sobell, 142 F.Supp.515, 524 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir. 1957), cert.den., 355 U.S. 873 (1958).

The language of Article XII of the 1977 Treaty makes it clear that defendants may not be tried or punished based upon facts which extradition was rejected. The foregoing Treaty provision must he construed with the "highest good faith" not only in relation to the parties of the Treaty, but also as to the defendants who are, in essence, third party beneficiaries of the arrangement. Johnson v. Browne, 205 U.S. 309, 321 (1907).

United States v. Flores, 538 F.2d 959 (2d Cir. 1976), is inapposite. In that case, the Court held the doctrine of specialty "has never been construed to permit foreign intrusion into the evidentiary procedural rules of the requisitioning state. . ." (538 F.2d at 944). In Flores, the defendant was extradited from Spain for conspiracy to

sell narcotics. The Spanish High Court limited extradition to "acts committed between September 3, 1970, and April 30, 1977, excluding any previous or subsequent acts." (Id., at 942) The Second Circuit upheld the trial judge's decision to permit evidence of a conspiracy prior and subsequent to those dates, on its interpretation of the specialty doctrine and on the fact that Flores was extradited pursuant to the "Geneva Convention," Article XIII of which states:

> "Nothing in the present Article shall be construed as an undertaking on the part of the high contracting parties to adopt in criminal matters any form or method of proof contrary to their laws."
> Id., at 945.

The Appellate Court's reliance on Flores is misplaced. First, the extradition of defendants was not granted pursuant to the "Geneva Convention," but pursuant to

the Anglo-American Extradition Treaty which contains very different language from that quoted in Flores. The latter Treaty specifically states that defendants may not be "detained or proceeded against" for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted. The plain meaning of the words is that defendants may only be tried upon the facts which the English magistrate found sufficient to warrant their extradition and not facts which he rejected. A fortiori, the facts upon which the extradition was denied, i.e., the earlier conspiracy to burgle and the earlier bugging incident may not be used to "proceed against" them. Defendants may not be tried on them. Nor may they be "proceeded against" for those other extradition-

rejected crimes.

Thus, the argument is not that the Government may not use Rule 801(d)(2)(E) to introduce evidence to support the facts with respect of which extradition was granted, but that the Government may not use a rule of evidence to expand the scope of facts upon which the defendants may be "detained or proceeded against." For this would be permitting the Government to do indirectly what it cannot do directly and reduce the protections the Treaty provides to a mere sham and mockery. It would make meaningless the limitation of the Court's jurisdiction imposed by the Treaty.

Placing aside the language of the current Treaty, even under the doctrine of specialty, which enables the asylum state to specify (only) the crimes upon which the court of the requesting

country may proceed, added credence is given to the kind of limitation contained in the current Anglo-American Extradition Treaty. In Ficconni v. Attorney General of the U.S., 462 F.2d 475 (2d Cir. 1972), the court held the defendants were properly tried on a superseding indictment filed after extradition from Italy which specified charges different from those presented for extradition. The Court said the principal inquiry under the doctrine of specialty, as interpreted by United States v. Rauscher, supra, was whether the requested Government would regard such prosecution as a breach of faith.

In the instant case, the Lord Chief Justice of England stated that:

> "If [the defendants] were ostensibly tried for burglary, but in fact punished for the commission of a different offense, I should regard that as flagrant bad faith."

Regina v. Governor of Pentonville Prison, ex parte Budlong, supra.

This statement is surely evidence that the requested Government would consider any attempt to use procedural rules to evade the meaning of their extradition order and the Anglo-American Extradition Treaty as a breach of faith. The doctrine of specialty is not controlling here since it is not only the undertaking of the United States Government in the English court, Regina v. Governor of Pentonville Prison, supra, which would be violated, but the Treaty, which is the law of the United States and which limits the power of the courts. Still, the question which arises under the doctrine is relevant because it relates to the question of the sort of actions the prosecution may take after extradition. The question

to be asked under the doctrine, Ficconni, supra, and the answer to be provided by the Lord Chief Justice of England show that the interpretation of the language of Article XII advanced by defendants is thoroughly consistent with the doctrine. The limitation defendants seek on evidence that may be used at trial is one to which the United States agreed in the Treaty, more comprehensive than the limitation in the earlier Treaty of 1935. The limitation is not one, it must be emphasized, on the Rules of Evidence or the procedure by which evidence may be admitted. Rather, it is a substantive limitation on the facts which may be used to try defendants.

B. DEFENDANTS WERE PUNISHED FOR NON-EXTRADITED OFFENSES IN VIOLATION OF THE TREATY.

The Treaty specifically prohibits

these defendants from being punished for any crime other than the one for which they were extradited, i.e., second degree burglary. Article XII states:

> "A person shall not be detained . . .for any offense other than the extraditable offense. . ."

During the sentencing proceedings, the Government stated:

> "In considering sentencing, we have considered and we submit should [sic] be considered the relative positions of these defendants to the other defendants who were convicted. As this Court knows, nine other defendants were convicted last December. Only one was above these two defendants in authority, Mary Sue Hubbard. All the others, seven others, were high officials below them who carried out their orders." RT Dec.19,1980, p.49.

The Court stated:

> "Well, I will tell you what the facts of life are. For the last 5 years. . .there has been great concern about the discretion the trial judges have in sentencing out of a panoply of statutes under which we have to sentence which has resulted in sentencing disparities. . . as a matter of fact

"this Court has personally experienced review in which it has been indicated that consideration ought to be given, to what are comparable sentences meted out by other judges sitting in this very Court.

". . .and I cannot, as I have already indicated, be oblivious to the totality of what we have been involved in, in this Court." RT Dec. 19, 1980, pp.52,65. (Emphasis added.)

The District Court thereafter meted out sentences almost identical to the nine co-defendants earlier tried and sentenced.

Likewise, the Probation Department for the District Court of the District of Columbia, in violation of the Treaty, did not limit itself to a consideration of the charges for which the defendants were extradited when recommending its sentence guidelines. In fact, sentencing recommendations and guidelines of the Probation Department took into account the entire panoply of facts and

allegations contained in the unexpurgated indictment and elsewhere. In the words of the highest court in England,

> ". . .if [the defendants] were ostensibly tried for burglary, but in fact punished for the commission of a different offense, I should regard that as flagrant bad faith." Regina v. Governor of Pentonville Prison, supra. (Emphasis added.)

The Lord Chief Justice's fears became reality when the trial court improperly imposed sentence and thus violated the Treaty.

C. THE HOLDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO DIVEST ITSELF OF JURISDICTION IGNORES THE IMPACT OF THE EXTRADITION TREATY UPON WHAT MAY BE CONSIDERED A "LEGITIMATE FEDERAL CONCERN."

Defendants urged the District Court to decline to try local offenses (i.e., second degree burglary charges) when those offenses had been disassociated from any federal charges prior to trial and retention of the case would not

comport with the responsibilities of the District Court with respect to matters of legitimate federal concern. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), this Court held that federal courts should decline to exercise jurisdictional power in favor of local courts if such exercise opposes "considerations of judicial economy, convenience and fairness to litigants.

In upholding the lower court's exercise of jurisdiction in this unique case, it was held:

> "The defendants contend that the District Court abused its discretion because any matters of federal concern in this case are of a trivial nature and do not justify retention of the case in federal court. We cannot agree. The defendants were tried for illegally entering the United States Government Offices with intent to steal property owned by the United States. These violations of the District of Columbia Code were offenses against the United States, prosecuted in the name of the

"United States and were of unique concern to the United States. [Citations omitted.]" (At p. 7.)

The limitations imposed in this "atypical" case, by virtue of the Extradition Treaty block the valid assertion of a legitimate federal concern in the instant second degree burglary charges. The legitimate federal concern lies in the non-extradited "massive conspiracies against the United States" to enter Government offices surreptitiously and steal sensitive Government documents. By virtue of the Treaty restrictions, i.e., burglary with intent to steal photocopy paper, the District Court should not have considered the non-extradited offenses which provide the only legitimate basis for federal concern.

Although the charges in the instant prosecution involved burglaries committed with intent to steal Government

property, i.e., photocopy paper, which surely would be of minimal concern to the United States, this does not ipso facto mean that the criminal law contained in the United States Code is applicable. In fact, it is not, and that is precisely the reason that the federal government chose to charge the burglary offenses as local District of Columbia crimes. The Appellate Court has twice ruled, in United States v. Jackson, 562 F.2d 789 (D.C.Cir.1977), and United States v. Kember, 648 F.2d 1354 (D.C. Cir. 1980), that the U.S. District Court for the District of Columbia should decline to try local offenses when those offenses have been disassociated from federal charges prior to trial, and retention of the case would not comport "with the responsibilities of the District Court with respect to matters of

legitimate federal concern." (Id., at 1355.)

Federal concern surely must relate to matters of substance and not trivialities. The defendants were not extradited for burglaries with intent to steal valuable information or secrets from the Government. Rather, the Bow Street Magistrate's Court extradited the defendants for the crimes of burglary with intent to steal photocopy paper. Photocopy paper, as opposed to what may be contained on it, is trivial. The substantial federal concern is the various conspiracies alleging burglary and theft of important Government property. This substantial federal concern cannot be considered because this is an "atypical" case by virtue of the Anglo-American Extradition Treaty, which limited extradition for second degree burglary

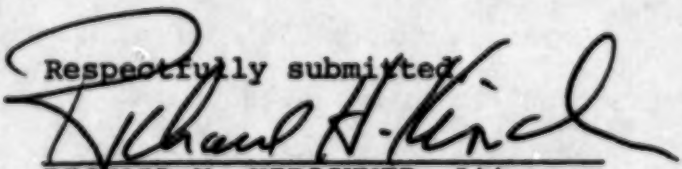
for the purpose of "stealing photocopy paper." The concern of stealing photocopy paper can only be a stalking horse for Treaty-barred substantial federal concerns.

Likewise, retention of this case by the District Court opposed considerations of judicial economy, convenience and fairness to litigants. The Appellate Court's statements concerning these issues are based on sheer speculation and ignore the uncontested factual statements set forth in defendant's Petition for Rehearing.

CONCLUSION

For the foregoing reasons, it is respectfully requested this Petition be GRANTED.

Respectfully submitted,



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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2563

UNITED STATES OF AMERICA

v.

JANE KEMBER, APPELLANT

No. 80-2564

UNITED STATES OF AMERICA

v.

MORRIS BUDLONG, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(D.C. Criminal No. 78-00401

Argued September 21, 1981
Decided March 5, 1982

Judgment entered this date

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Richard H. Kirschner for appellants. *John A. Shorter, Jr.* also entered an appearance for appellant Kember in No. 80-2563. *R. Kenneth Mundy* also entered an appearance for appellant Budlong in No. 80-2564.

Michael W. Farrell, Assistant United States Attorney, with whom *Charles F. C. Ruff*, United States Attorney at the time the briefs were filed, *John A. Terry*, *Raymond Banoun*, *Judith Hetherton*, *Steven C. Tabackman* and *Katherine Winfree*, Assistant United States Attorneys were on the brief for appellee.

Before: ROBINSON, *Chief Judge; and* ROBB and GINSBURG, *Circuit Judges.*

ROBB, *Circuit Judge*: In August 1978 Kember, Budlong, and nine other officials or employees of the Church of Scientology were indicted in the United States District Court for the District of Columbia. The indictment, in twenty-eight counts, charged the defendants with conspiracy to burglarize government offices and steal government documents, 18 U.S.C. § 371, interception of oral communications, 18 U.S.C. § 2511(1)(a), theft of government documents, 18 U.S.C. § 641, burglary, 22 D.C. Code § 1801(b), and obstruction of justice, 18 U.S.C. § 1503. Warrants were issued for the arrest of Kember and Budlong who were in England, and the United States requested the United Kingdom to extradite them on all the charges. After hearings before the Bow Street Stipendiary Magistrate the defendants were ordered extradited for trial on only the burglary charges. The High Court of Justice, Queens Bench Division, denied the defendants' application for a writ of habeas corpus and on March 13, 1980, Kember and Budlong were surrendered to the custody of the United States. Meanwhile, on October 26, 1979, the nine codefendants were convicted of various offenses charged in the indictment. They appealed, and on October 2, 1981, the convictions were affirmed. *United States v. Heldt*, —— U.S. App. D.C. ——, —— F.2d —— (1981) (Per Curiam).

Before their trial in the District Court Kember and Budlong moved for an order divesting the court of jurisdiction. The ground of their motion was that because they had been extradited for trial on only the burglary counts in the indictment, charging violations of the District of Columbia Code, the District Court lacked subject matter jurisdiction over the case. The motion was denied. *United States v. Kember*, 487 F. Supp. 1340 (D.D.C. 1980). The defendants also moved to suppress documentary evidence seized by the government in a search of the offices of Scientology in Los Angeles. This motion was denied upon the ground that Kember and Budlong had failed to demonstrate a legitimate expectation of privacy in the premises searched. Thereafter the defendants went to trial before a jury.

During the trial of Kember and Budlong several of the convicted codefendants, who had been subpoenaed to testify for the government under grants of use immunity, refused to testify and were held in civil contempt by the District Court. They appealed on the ground, among others, that because Kember and Budlong were extradited and arraigned only on "local" charges, the court lacked jurisdiction to try them and the court therefore had no jurisdiction to compel the codefendants' testimony. This court held, however, that because federal and local offenses were properly joined in the original indictment the District Court had power to try Kember and Budlong, so that no jurisdictional barrier blocked the demand for the codefendants' testimony. *United States v. Kember*, —— U.S. App. D.C. ——, 648 F.2d 1354 (1980) (Per Curiam). Thereafter Kember and Budlong were tried and found guilty on nine counts of burglary and each was sentenced to concurrent terms of imprisonment of two to six years. These appeals followed.

The government's evidence at trial established that Kember and Budlong were two of the highest officials of Scientology. At the time of the burglaries charged, Kember was Guardian World-Wide, a position subor-

dinate only to that of L. Ron Hubbard, the founder of Scientology, and his wife Mary Sue Hubbard. The Guardian's Office, which had been established "to help [L. Ron Hubbard] enforce and issue policy, [and] to safeguard Scientology" set forth basic policy by means of Guardian Orders, which could be issued only by L. Ron Hubbard, Mary Sue Hubbard, or Kember. Budlong, as Deputy Guardian for Information World-Wide, supervised the Scientology Information Bureau which included the United States Information Bureau with headquarters in Los Angeles. An essential function of the Bureau was the collection of information of interest to Scientology by overt and covert means, including the theft of documents from government agencies.

The government's evidence consisted chiefly of testimony by Michael Meisner, a former official of Scientology, and documents seized by FBI agents from the offices of Scientology in Los Angeles. Without going into detail, it is enough to say that the proof established a project undertaken by Kember, Budlong, and other officials of Scientology, to steal documents of interest to Scientology, including litigation files of government attorneys, from various offices of the United States government. The thefts were accomplished by means of burglaries of government offices. As the district judge summarized the evidence: "the determination was made at the top to get every shred of evidence that the United States Government has on the Church of Scientology." These activities were carried on at the direction of the officers of Scientology, including Kember and Budlong. We refer to the statement of facts set out in some detail in *United States v. Heidt*, —— U.S. App. D.C. ——, —— F.2d —— (1981) (Per Curiam).

On this appeal Kember and Budlong aver that the District Court committed four prejudicial errors. First, they argue that the court abused its discretion by retaining the case when the only counts left for trial were those alleging violations of the District of Columbia Code. Second,

they contend that the court violated the Anglo-American Extradition Treaty of 1977 by admitting "evidence of facts not submitted to the British courts during the extradition proceedings" and "evidence of facts which were not the 'facts in respect of which extradition has been granted.'" Third, they argue that the district judge erred by refusing to disqualify the United States Attorneys Office, or in the alternative, members of that Office, for bias and conflict of interest. Finally, they say the court should have sustained their motion to suppress. We consider each issue in turn.

Retention of the Case in Federal Court

The District of Columbia Code, Section 11-502(3), gives the United States District Court for the District of Columbia jurisdiction of "[a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense". In the indictment against Kember and Budlong, counts charging burglary in violation of the District of Columbia Code, 22 D.C. Code § 1801(b), were joined with counts charging conspiracy, interception of oral communications, and theft of government documents in violation of the Federal Criminal Code, 18 U.S.C. § 371, 18 U.S.C. § 2511(1)(a), and 18 U.S.C. § 641. Because they were extradited for trial and were tried for only the local burglary offenses Kember and Budlong say they should have been tried in the District of Columbia Superior Court. They argue that the District Court abused its discretion by failing to divest itself of jurisdiction. We do not agree.

As we have said, this court held in *United States v. Kember*, —— U.S. App. D.C. ——, 648 F.2d 1354 (1980) (Per Curiam), that the District Court had the power to try Kember and Budlong for the local offenses: "We believe that, so long as an indictment properly joins federal and local offenses under Fed.R.Crim.P. 8 . . . Congress

intended to give the federal court power to try the local offense. The statute does not suggest that any disposition of the federal offense, subsequent to proper joinder in an indictment, withdraws power over the local offense." *Id.* at ——, 648 F.2d at 1359 (footnote and citation omitted). We noted, however, that the District Court must use discretion in exercising its power when the only issues presented for resolution are those based on local law:

> Just as a federal court asked to exercise pendent jurisdiction over a state civil claim should decline to do so if the federal claims have been dismissed before trial . . . the U.S. District Court for the District of Columbia should decline to try local offenses when those offenses have been disassociated from any federal charges prior to trial and retention of the case would not comport with "[t]he responsibilities of the District Court with respect to matters of federal concern." . . . We underscore, however, that this is a matter of sound exercise of the court's discretion, not a question of its power.

Id. at ——, 648 F.2d at 1360 (quoting *United States v. Jackson*, 183 U.S. App. D.C. 270, 281, 562 F.2d 789, 800 (1977)) (citations omitted). In other words, the federal court must dismiss a criminal prosecution when federal charges have faded from the case prior to trial, leaving only District of Columbia offenses for adjudication, unless the court determines, in its discretion, that retention of the case is warranted by remaining matters of legitimate federal concern.[1]

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[1] The defendants rely on United States v. Jackson, 183 U.S. App. D.C. 270, 562 F.2d 789 (1977), holding that the district court erred in retaining jurisdiction when the federal charges had been dismissed on pretrial motion. In *United States v. Kember*, however, we read the opinion in *Jackson* as holding only that the federal and local counts were improperly joined in the indictment and that Congress could not have intended to empower the federal courts to try D.C. offenses unless those offenses were properly joined. We re-

The defendants contend that the District Court abused its discretion because any matters of federal concern in this case are of a trivial nature and do not justify retention of the case in a federal court. We cannot agree. The defendants were tried for illegally entering United States government offices with intent to steal property owned by the United States. These violations of the District of Columbia Code were offenses against the United States, prosecuted in the name of the United States, and were "of unique concern to the United States." *United States v. Kember*, —— U.S. App. D.C. ——, ——, 648 F.2d 1354, 1358 n.3, 1359 (1980) (Per Curiam); *Goode v. Markley*, 195 U.S. App. D.C. 391, 394, 603 F.2d 973, 976 (1979), *cert. denied*, 444 U.S. 1083 (1980). *See also United States v. Cella*, 37 App. D.C. 423 (1911), *cert. denied*, 223 U.S. 728 (1912).

The defendants attempt to cast their argument in a different form by averring that even if the case involves matters of legitimate federal concern the District Court abused its discretion because retention of the case opposed considerations of judicial economy, convenience, and fairness to litigants. The defendants rely on *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), in support of their contention that such factors must be considered by the federal court. Citation to the *Gibbs* case does not help the defendants. They make no claim of inconvenience to them; on the other hand, had the case been dismissed by the District Court the government would have suffered great inconvenience, for dismissal would have required a new indictment in Superior Court and new extradition proceedings. A new beginning would not have promoted judicial economy; when the motion to divest jurisdiction was made, the District Court had already invested

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jected the alternate holding by the *Jackson* court that the district court lost jurisdiction to try the local offenses. United States v. Kember, —— U.S. App. D.C. ——, ——, 648 F.2d 1354, 1359 n.9, (1980) (Per Curiam).

substantial time in the case. The argument that retention of jurisdiction was unfair to the defendants is likewise untenable. They say that the District Court was somehow biased against them because of the trial and sentencing of the codefendants, that it was unfair to try them in the United States Courthouse when that was one of the buildings they were alleged to have burgled, and that those convicted of burglary in the Superior Court serve less time in prison than those convicted in federal court. We think these contentions are wholly without merit.

In sum, we hold that the District Court did not abuse its discretion by retaining jurisdiction over the defendants' trial. Matters of unique federal concern remained dominant in the case, considerations of judicial economy and litigational convenience weighed heavily in support of the District Court's decision, and no tenable argument can be made that federal court trial was unfair to the defendants.

The Alleged Treaty Violations

Kember and Budlong were extradited from England pursuant to the Anglo-American Extradition Treaty of 1977. Article XII of that Treaty provides in part:

> A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters....

Anglo-American Extradition Treaty of 1977, Article XII (1), 28 U.S.T. 227, T.I.A.S. No. 8468. The defendants contend that the District Court violated the Treaty by admitting evidence of facts that went beyond "the facts in respect of which" extradition had been granted. In particular they complain of (1) evidence of a conspiracy to obtain government documents illegally, (2) evidence

that confidential information contained in a government report which had been illegally acquired was later disseminated to the press by Scientology, (3) evidence concerning the use of electronic listening devices planted in the Internal Revenue Service offices by Scientologists, and (4) evidence that the Scientologists used a code in transmitting information. According to the defendants none of these facts was presented to the British courts during the extradition proceedings, and in any event they relate only to charges for which extradition was denied or for which extradition was not sought. It follows, the defendants argue, that such facts could not be "facts in respect of which . . . extradition has been granted", and they could not be used to establish the defendants' guilt of the offenses for which they were extradited.

The defendants concede, as they must, that under the Federal Rules of Evidence the evidence about which they complain was competent and admissible in the burglary prosecution. Brief for Appellants at 38, 62. They argue, however, that Article XII of the Treaty restricts the prosecution's case at trial to those facts which were presented in the extradition proceedings and upon which extradition was granted. This theory would require a government requesting extradition to present to the foreign magistrate every fact known to it upon which it intends to rely at trial. We think such an interpretation of the Treaty is contrary to the authorities and offensive to common sense.

Extradition proceedings before a magistrate are not a trial but rather a preliminary examination to determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation. *Collins v. Loisel*, 259 U.S. 309, 316 (1922); *Charlton v. Kelly*, 229 U.S. 447, 460 (1913); *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Jhirad v. Ferrandina*, 536 F.2d 478, 482 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). As the Supreme Court said in *Collins v. Loisel*,

quoting from *In re Wadge*, 15 F. 864, 866 (1883), if more than a *prima facie* case were required "[t]he result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procurred a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties." 259 U.S. at 316. Thus, in ordering the extradition of Kember and Budlong, the British courts required only a showing of a *prima facie* case of burglary; there was no suggestion that the proceedings were a dress rehearsal of a trial. The Stipendiary Magistrate in his decision stated: "I am not saying whether I would find the defendants guilty or not, my function is to say whether a jury properly directed could convict." *See* Appendix for Appellee at 28. In its judgment sustaining the Magistrate's decision, the Queens Bench Division (Lord Chief Justice Widgery and Mr. Justice Griffiths) noted that the Magistrate was "satisfied that the facts revealed a *prima facie* case of burglary" and that "there has been no suggestion that the evidence before the magistrate did not establish a *prima facia* case of burglary against the Applicants both according to American and English law." *See* Appendix for Appellee at 2.

Notwithstanding the authoritative statement of the Stipendiary Magistrate and the Queens Bench Division that the government was required to produce only a *prima facie* case before the Magistrate, the defendants insist that "all of the facts of which the requesting state is aware should be presented to the asylum state during the extradition proceeding." Brief for Appellants at 43. From this it follows, the defendants say, that any facts not presented to the Magistrate may not be proven at the trial. According to the defendants this result is required

by the language of Article XII of the Extradition Treaty of 1977. The defendants emphasize that the wording of Article XII differs from that of the equivalent provision in the Anglo-American Extradition Treaty of 1935 which provides in part:

> A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered . . . .

Anglo-American Extradition Treaty of 1935, Article XII, 47 Stat. 2122. The defendants conclude "that in interpreting Article XII of the current Treaty, the court must find that the law of the United States extends *some greater measure of protection* than it did under the 1935 Treaty." Brief for Appellants at 42-43 (emphasis in original). This "greater measure of protection" is said to be that the government at trial is prohibited "from using facts of *which it was aware, but chose not to submit for extraditon.*" Brief for Appellants at 43 (emphasis in original). We are not persuaded by the defendants' argument.

Article XII of the 1977 Treaty is patterned after section 3 of the British Extradition Act of 1870 which governs extradition from Great Britain.[3] Section 3 states in part:

> A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of

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[3] The minutes prepared by the United States Department of State during the treaty negotiations state that Article XII "was drafted in accordance with the extradition law of the United Kingdom." Minutes of Extradition Negotiations 15 (Feb. 5, 1970).

> that state, or by arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender *other than the extradition crime proved by the facts on which the surrender is grounded.*

British Extradition Act of 1870, 33 & 34 Vict., Ch. 52, § 3(2) (emphasis added). In *Regina v. Aubrey-Fletcher, Ex parte Ross-Munro* [1968] 1 Q.B. 620, the Queens Bench Division considered and interpreted section 19 of the Extradition Act of 1870, which is complementary to section 3. The precise point considered was the contention of applicant Ross-Munro that section 19 prohibited consideration of evidence relating to facts other than the facts on which his extradition was granted. The court (Lord Parker, C.J., Salmon, L.J., and Widgery, J.) held:

> The point involved here is a novel one in so far as no previous decision appears to have been given on the point. It depends upon the true construction of section 19 of the Extradition Act, 1870; that section reads:
>
> > "Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in schedule I to this Act is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions *other than such of the said crimes as may be proved by the facts on which the surrender is grounded.*"
>
> *It is convenient at once to state that that section is complementary to section 3(2) of the Act which is dealing with the case of a fugitive criminal, that is the foreigner, when he is surrendered by this country to the foreign state, . . .*

The argument for the applicant is put very concisely . . . in this form: that the person concerned who is surrendered to this country cannot be committed and put in peril of conviction on any facts other than those put forward to secure his surrender.

• • • •

This is a novel point and, if it be right, it has an alarming consequence. It would mean that not only is this a restriction on the procedure on committal, a restriction on the receiving of evidence, but indeed logically it would affect the trial, because no evidence would be admissible at the trial unless it was in regard to facts raised in the surrender documents. Another alarming consequence would be that if, when the person concerned arrives in this country after being surrendered by the foreign state, he is arrested, cautioned and questioned by a police officer, evidence of what he said, whether for him or against him, would be quite inadmissible.

In my judgment Parliament cannot have intended any such thing in this section. Two things are quite clear, as it seems to me. One is that that section is designed to prevent a man from being tried after his surrender for a crime other than that for which he has been extradited. . . .

Secondly, . . . the section is not in any way intended to interfere with the ordinary procedures and laws of evidence in this country whether in committal proceedings or at the trial. . . .

• • • •

It is, I am quite satisfied, in no sense intended to be a restriction, for instance, on the evidence which can be called in this country, whether it be in the committal proceedings or in the trial itself.

• • • •

When, as in this case, the man who has been surrendered is being charged in this country with the very offences in respect of which the warrant was issued, and for the trial of which he was surrendered

> by the foreign country, it seems to me that it would be putting a very strained, artificial and indeed ridiculous construction on section 19, to interpret it in the sense suggested ....

Id. at 626-29 (emphasis added). The reasoning of the British court with respect to section 19 of the Extradition Act of 1870 applies with equal force to the "complementary" section 3(2) of that Act and to Article XII of the 1977 Treaty, which is derived from section 3(2).

A treaty must be interpreted so as to carry out the intention of the parties; its meaning is to be ascertained by the same rules of construction and reasoning which apply to the interpretation of private contracts. *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902). Applying this test to Article XII we think the construction placed upon it by the defendants is, in the language of the British court, "a very strained, artifical and indeed ridiculous construction", and one which could not have been intended by the contracting parties. If the defendants' contention is correct Article XII radically changed both the law applicable to extradition hearings and the rules of evidence in both the United States and British courts. We hold that no such result could have been intended. We think Article XII merely recognized and applied the "principle of specialty" which requires that a requisitioning state may not, without the permission of the asylum state, try or punish a fugitive for any crimes committed before the extradition except the crimes for which he was extradited. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973); *see United States v. Rauscher*, 119 U.S. 407 (1886); *In re Woodall*, 57 L.J. 72 (C.A.Cr. 1888). The doctrine has nothing to do with the "scope of proof admissible into evidence in the judicial forum of the requisitioning state". *United States v. Flores*, 538 F.2d 939, 944 (2d Cir. 1976). In that case Flores was extradited to the United States for

trial on conspiracy charges "expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971, excluding any previous or subsequent acts." *Id.* at 941. The Circuit Court of Appeals held that although prosecution for earlier offenses was barred, evidence of such offenses might be introduced to establish the crimes for which Flores was tried. In other words, "the normal procedural and evidentiary rules of our domestic courts continue to control Flores' prosecution." *Id.* at 945. We hold that the normal procedural and evidentiary rules continued to apply in the case of Kember and Budlong.

THE ALLEGED DISQUALIFICATION OF THE PROSECUTORS

Kember and Budlong argue that the United States Attorneys Office had a disqualifying emotional interest in the outcome of the case because it was the "victim" of one of the crimes alleged in the indictment. In addition, they contend that two of the prosecutors were disqualified because they were defendants in a civil action filed by Scientology ten days after the search of the Scientology offices in Los Angeles. This suit alleged that the search was conducted in bad faith, with the intention of violating Scientology's constitutional rights. Our opinion in *United States* v. *Heldt*, —— U.S. App. D.C. ——, —— F.2d —— (1981) (Per Curiam), disposes of the contention that the United States Attorneys Office was disqualified because it was the victim of the crime. As for the alleged disqualification of the Assistant United States Attorneys we need only to emphasize that there was no evidence of bad faith or any misconduct on their part. In the absence of such evidence a defendant cannot disqualify a prosecutor by the mere filing of a lawsuit. As we said in the *Heldt* case,

> The potential conflict of interest that might result from a personal civil suit filed against an Assistant United States Attorney (AUSA) by a defendant in a criminal case for acts undertaken by the AUSA in

> his official capacity in the criminal matter would have to be very strong before disqualification would be justified. It could not be justified by mere inference from the filing of the suit but would require *proof*, by clear and convincing evidence, of a prima facie case of misconduct on the part of the AUSA.

Id. at —— n.80, —— F.2d at —— n.80 (emphasis in original). The defendants failed to produce the proof required by this standard.

THE MOTION TO SUPPRESS

Kember and Budlong argue that their constitutional rights were violated by the search of the Scientology offices. Our opinion in the *Heldt* case disposed of this point.

The judgments are

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2563 September Term, 1981

United States of America,

v.

Mary Sue Hubbard, et al.

Jane Kember,

Appellant.

Criminal No. 78-00401

ARGUED 9-21-81

And consolidated case no. 80-2564

BEFORE: Robinson, Chief Judge, Robb and Ginsburg, Circuit Judges

O R D E R

On consideration of appellants' petition for rehearing, filed April 5, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

FILED
Apr. 15, 1982

BY: Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2563 September Term, 1981

United States of America
v.
Mary Sue Hubbard, et al.
Jane Kember,
Appellant.

Criminal No. 78-00401

ARGUED 9-21-81

And Consolidated case No. 80-2564

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

O R D E R

Appellants' suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc

. . .

. . .

. . .

that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

FILED
Apr. 15, 1982

BY: Robert A. Bonner
Chief Deputy Clerk.

Circuit Judges Tamm and Mikva did not participate in the foregoing order.